

ILLINOIS COMMERCE COMMISSION

ADMINISTRATIVE LAW JUDGE'S HEARING REPORT

Hearing Date 7-14-05
Case No. TO4-0084 Type of Case REL TRANS.

Petitioners COFFEEN & WESTERN

Respondents _____

Transcript Taken? YES ☒ Continued To THURSDAY
AUG. 25, 2005 or ☐ Heard and Taken

Pleadings and Motions 10 AM

PET. MOTION TO STRIKE ICA BRIEF DENIED.

PET. OBJ. TO ICA INQUIRY INTO FINANCIAL COSTS OF PROJECT: SUSTAINED.

Exhibits Filed

EX. 3.0 Rebuttal Testimony ITAY
EX 3.1 Aerial Photo
EX 3.2 ADDRESS & MOORE

(A)
(A)
(A)

MONTGOMERY COUNTY EX. 2.

Admitted as
BRIEF

Remarks

GRISHAM TOWNSHIP EX. 2.

Admitted as Brief

NORFOLK SOUTHERN EX. 2.

(A)

Send Notice ☒

Administrative Law Judge DWJ

(Administrative Law Judge: No hearing is completed until you have filled out this form in full).

DOCKETED

July 5, 2005

Mr. Dean Jackson,

In response to Mr. Humphries assessment of railroad crossings in Grisham Township:

Most crossings are recommended to have either crew flagging or flashing lights and gates. It is my concern with the crew flagging is the length of time at which a train will be at each crossing. If a separate vehicle was to used the round about way to get from one crossing to another the train could be by the crossing unless the train was going extremely slow. It is my concern to the motoring public would be better suited with lights.

The crossing on Loew Avenue at which the tracks parallel the road surface I feel lights and gates would be a good investment for public safety.

Please remember these crossings are school bus routes from Hillsboro schools and Litchfield schools.



Thomas Chappellear
Grisham Township Road Commissioner

OFFICIAL FILE

ILL. C. C. DOCKET NO. 104-0084
Grisham Township Exhibit No. 2

Witness _____

Date 7-14-05 By ccr

Montgomery County Highway Department

Amy McNeal County Engineer
PO Box 70 - 1215 Seymour Avenue / Hillsboro, Illinois 62049
Telephone 217/532-6109 Fax 217/532-6642

July 6, 2005

Honorary Dean W. Jackson
Chief Administrative Law Judge
Review & Examination Program
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

OFFICIAL FILE
I.A. C. G. DOCKET NO. T04-0084
County Exhibit No. 2
Witness _____
Date 7-14-05 Reporter cal

RE: Case No. T04-0084

Dear Judge Jackson:

This letter is in response to Mr. Humphrey's recommendations for control at the Long Bridge Trail crossing.

Although Mr. Humphrey's recommendation is to control the crossing as proposed, I disagree. I understand that there are engineering principles and warrants to be met, but why not look at the common sense side of the issue.

Any crossing that has school buses going over it should have a minimum of lights. The cost of this upgrade is not comparable to the life of a child.

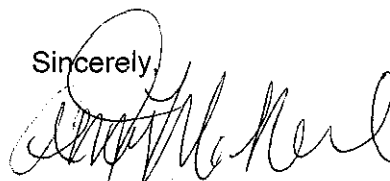
I understand that Ameren/CIPS has several reasons to build this railroad. However what I don't understand is why the ICC would want any more crossings without a minimum of lights if they have programs such as the grade crossing protection program to upgrade in place crossings.

I would also like to see a concrete crossing due to the irregularity in maintenance of current crossings. Last year one of my township commissioners had a car get its tire stuck in a crossing that he had been calling the railroad about. And the railroad said that they didn't know when they would have time to repair it. The township commissioner offered to repair it and the railroad told him if he did they would sue him. I know Ameren/CIPS says they will maintain these crossings regularly, but these same people will not be here forever and the county will be stuck with this crossing forever.

As a public official, I feel it is my responsibility to make the roads as safe as possible for the traveling public. And because of this, I am imploring you to seriously consider at least lights, if not lights and gates at the Long Bridge Trail crossing for the safety of our children.

Thank you for your assistance regarding this matter. If you have any questions feel free to contact this office.

Sincerely,



Amy McNeal
County Engineer

14
OFFICIAL FILE

Before the
Surface Transportation Board

ILL. C. C. DOCKET NO. T04-0084

Norfolk Southern Intervenor
Exhibit No. Z

Witness _____

Date 7-14-05 Reporter Rad

Docket No. 34435

AMEREN ENERGY GENERATING COMPANY
— CONSTRUCTION AND OPERATION EXEMPTION —
IN COFFEEN AND WALSHVILLE, IL

**NORFOLK SOUTHERN RAILWAY COMPANY'S
COMMENTS ON THE DRAFT ENVIRONMENTAL ASSESSMENT
SERVED MAY 25, 2005**

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Before the
Surface Transportation Board

Docket No. 34435

AMEREN ENERGY GENERATING COMPANY
— CONSTRUCTION AND OPERATION EXEMPTION —
IN COFFEEN AND WALSHVILLE, IL

**NORFOLK SOUTHERN RAILWAY COMPANY'S
COMMENTS ON THE DRAFT ENVIRONMENTAL ASSESSMENT
SERVED MAY 25, 2005**

On May 5, 2004, the Surface Transportation Board ("Board") instituted a proceeding to review the petition, filed on February 5, 2004, by Ameren Energy Generating Company ("AEGC"), on behalf of itself and its newly created subsidiary, the Coffeen and Western Railroad Company ("CWRC" or "Coffeen"), for AEGC to construct, and for Coffeen to operate, an approximately 13-mile rail line between AEGC's Coffeen Power Plant to connections with the Union Pacific Railroad Company ("UP") and The Burlington Northern and Santa Fe Railway Company ("BNSF") near Walshville, IL (this Finance Docket No. 34435 proceeding is hereinafter referred to as the "Build-out Proceeding").

The Build-out Proceeding is associated with, but not formally related to, two other proceedings before the Board: (1) Finance Docket No. 34497, Coffeen and Western Railroad Company – Lease and Operation Exemption – Near Coffeen, Illinois, served May 10, 2004 ("Coffeen Notice of Exemption"); and (2) Finance Docket No. 34498, Ameren Corporation – Control Exemption – Coffeen and Western Railroad Company, served May 10, 2004 ("Common

Control Exemption”). The Build-out Proceeding also is associated with, but not formally related to, a proceeding before the Illinois Commerce Commission (“ICC”): Docket No. T04-0084, Coffeen and Western Railroad Company v. Montgomery County, IL, Petition for an Order authorizing the construction of at grade crossings in and around Coffeen, IL (“ICC Proceeding”).

Norfolk Southern Railway Company (“NSR”) submits these comments on the draft environmental assessment, served by the Board’s Section of Environmental Analysis on May 25, 2005 (“Draft EA”). NSR notes apparent inconsistencies in statements made by AEGC directly or by AEGC through its newly formed subsidiary, CWRC, in the various proceedings before the Board, the ICC and the Illinois Department of Transportation (“Ill. DOT”) that may undermine the facts upon which the Draft EA is based and upon which the Board’s Section of Environmental Analysis (“SEA”) has relied in its efforts to satisfy the Board’s obligations under the National Environmental Protection Act of 1969, 42 U.S.C. §§ 4321 to 4370f (“NEPA”).

DISCUSSION

A. Applicant entity

The following footnote appears in both the Executive Summary and the body of the Draft EA: “The rail line would be constructed and operated by the Coffeen and Western Railroad Company (CWRC), a wholly owned subsidiary of AEGC. For simplicity, this EA refers to AEGC, the applicant, in the balance of this document.” Draft EA, footnote 1 at ES-1 and Draft EA, footnote 4 at 1. This statement in the Draft EA, apparently based on representations made to

the Board by AEGC¹, is inconsistent with the Board's prior decisions in this proceeding, other statements in the EA, and other statements made by AEGC, directly or through its newly formed subsidiary, CWRC, to Ill. DOT in permit applications.

The Board has issued two decisions in this proceeding not related to the availability of the Draft EA; one served on May 5, 2004 and one served on July 9, 2004. In each of these decisions, the Board clearly identified AEGC as the party seeking construction authority, and distinguished AEGC, as the party seeking authority to construct the rail line, from CWRC, as the operator of the rail line:

By petition filed on February 5, 2004, Ameren Energy Generating Company (AEGC), a wholly owned subsidiary of Ameren Corporation (Ameren), on behalf of itself and CWRC, its newly formed railroad subsidiary, sought an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for AEGC to construct and CWRC to operate an approximately 13-mile rail line....

STB Finance Docket No. 34435, Ameren Energy Generating Co. – Construction and Operation Exemption – In Coffeen and Walshville, IL., served May 5, 2004, slip op. at 1; STB Finance Docket No. 34435, Ameren Energy Generating Co. – Construction and Operation Exemption – In Coffeen and Walshville, IL., served July 9, 2004, slip op. at 1.

¹ In a November 3, 2003 letter to SEA, for example, AEGC sought a waiver of the six-month pre-filing notice requirement under 49 C.F.R. 1105.10(c) and informed SEA that it would seek on behalf of a new railroad subsidiary [CWRC] Board authority to construct the proposed Build-out Project. Letter to Victoria Rutson, Chief, SEA, dated November 3, 2003, from Sandra L. Brown, Troutman Sanders LLP. A year later, CWRC submitted to SEA and the third-party consultant retained to assist SEA “proposed voluntary mitigation measures for [CWRC’s] proposed rail construction project” that were developed by CWRC and would be implemented by CWRC if the Board were to approve the pending Build-out Proceeding petition. Among other items, CWRC agreed to limit maximum train speeds on the rail line. Memorandum to Jo Carole Dawkins, Dawkins Consulting and David Navecky, SEA, dated November 12, 2004, from Sandy Brown and Rebecca Roback, Troutman Sanders LLP (“November 12, 2004 Voluntary Mitigation Memorandum”).

Further, the Draft EA footnotes discussed above appear inconsistent with the discussion on page 9 of the Draft EA implying that there are no operations or maintenance activities contemplated by CWRC at all. The Draft EA clearly states at page 9 that either or both of UP and BNSF will perform the railroad operations over the line, and that neither AEGC nor CWRC will perform the maintenance: "AEGC would enter into a trackage rights agreement with UP and/or the BNSF to provide rail service over the proposed line. * * * AEGC would select a contractor to perform all maintenance and inspections...." See also, Draft EA at 4 ("AEGC states that it expects to enter into a trackage rights agreement with UP and/or BNSF to provide rail service over the proposed rail line.")².

In its Petition to the ICC, however, CWRC seems to tell another story. CWRC bases its request before the ICC for railroad grade crossing approvals on the fact that: (1) the STB will authorize the construction; (2) the authorization will be for CWRC to construct the rail line; (3) CWRC will conduct the railroad operations; and (4) CWRC will maintain the railroad property. In ICC Docket No. T04-0084, Petition filed December 14, 2004, at 2, 3 and 4 (emphasis added) (attached as Exhibit A), CWRC states as follows:

Subject to the environmental review process, the STB will authorize the construction of the [proposed Route A]. * * * CWRC will be a Class III common carrier and will provide service to other shippers as requested. * * * This configuration and number of trains would enable CWRC to move approximately 3.4 million tons of coal to the Coffeen Power Plant per year. For the foreseeable future, CWRC does not anticipate exceeding 300 loaded trains per year.... * * * The track and grade crossings will be constructed and maintained by and at the expense of Petitioner [CWRC].

² In response to a question from SEA's third-party consultant, CWRC represented that it expects to enter into trackage rights agreement with UP and/or the BNSF to provide rail service over the line. Memorandum to Jo Carole Dawkins, Dawkins Consulting, dated August 9, 2004, from Sandra L. Brown and Rebecca Roback, Troutman Sanders LLP ("August 9, 2004 Memorandum"), at 11.

Although CWRC also makes the statement that “While CWRC may decide in the future to contract with another carrier to provide service on the new line, CWRC would still remain a common carrier and hold “residual common carrier” authority even in that event,” CWRC failed to submit to the ICC any operational data to the ICC for UP or BNSF operations over the line. Id.

This is not the only factual inconsistency as to the identity of the party or parties that will construct the rail line, operate and maintain a new railroad if all necessary regulatory approval is obtained. It is Ameren Energy Fuels & Services (“AFS”), not CWRC, that is identified as the party seeking to “construct, operate and maintain a railroad grade crossing on Illinois Route 127” in an April 19, 2005 Illinois DOT utility permit. See April 28, 2005 Permit 6-29222 Approval Letter with April 19, 2005 Illinois DOT utility permit request (attached hereto as Exhibit B) (“ILL DOT Proceeding”). AFS is a subsidiary of Ameren Corporation; it is not even a subsidiary of AEGC or CWRC (CWRC is a subsidiary of AEGC, which is a subsidiary of Ameren Corporation). In fact, AFS is the shipper’s representative acting on Ameren Corporation’s behalf to “evaluate the fuel and transportation resources available for each plant in order to maximize the flexibility and competitiveness of each [of Ameren Corporation’s] plant.” Petition for an Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line between Coffeen and Walshville, Illinois,” filed February 5, 2004, at 5.

Further, while represented in the ILL DOT Proceeding as the entity responsible for construction, operation and maintenance of the grade crossing, AFS is not identified as such or even mentioned in the Draft EA. Rather, SEA relies, for purposes of the Draft EA, upon representations by AEGC that CWRC will be responsible for the construction and operation of the proposed rail line, and that: 1) AEGC, or perhaps CWRC as its wholly owned subsidiary

(see footnote 1 of page ES-8 of the Draft EA), will be responsible for implementing a set of voluntary mitigation measures and any additional environmental mitigation measures recommended by SEA to address the environmental impacts of the proposed rail construction and operation project³; 2) either UP or BNSF will operate over the line; and 3) a contractor will maintain the line. By contrast, the ICC relies, for the purpose of its petition by CWRC, on representations that CWRC will construct, operate and maintain the line.

The factual information provided in the AFS permit is not consistent with the factual information presented in either the petition filed by AEGC before the Board in the Build-out Proceeding or the petition filed by CWRC before the ICC in the ICC Proceeding, nor is the factual information presented in those two proceedings consistent. The relevant regulatory bodies, in fulfilling their respective statutory obligations, and interested parties must be able to rely upon the information provided by applicants.

The issue of what entity is seeking authority to construct and what entity will operate the rail line is significant for determining environmental responsibility and for other corporate responsibility reasons, as AEGC, CWRC and AFS are apparently companies different in nature and with different types of legal powers. This is not a case of a distinction without a meaningful difference. Before the ICC, CWRC claims to be a common carrier that will build and operate the line, and is using that status to seek ICC authority for railroad grade crossings. Before the Ill. DOT, AFS claims to be the party that would build, operate and maintain the railroad crossings.

³ For example, CWRC represented to SEA and its third-party consultant that CWRC, and not some other entity, would consult with Ill. DOT and various county and local commissioners concerning grade crossings issues. August 9, 2004 Memorandum, at 5. Indeed, CWRC stated that it had re-aligned the track at the crossing with Highway 127 in order to address potential crossing safety issues. November 12, 2004 Voluntary Mitigation Memorandum, at 2. As noted above, however, it was AFS, a non-carrier shipper representative, that actually sought and obtained the permit from Ill. DOT to construct, operate and maintain the Highway 127 grade crossing, not CWRC. See, Exhibit B.

If, in fact, it is AEGC requesting the authority to construct, and if there is no intention for CWRC to perform any railroad operations, then those facts raise questions as to whether the Board's authority and the ICC's authority are properly being invoked and, as a corollary, how as a legal matter the environmental mitigation obligations imposed by the Board in connection with the construction and operation of a rail line are to be satisfied.

Moreover, the purpose of the existence of CWRC is now in question. It has been over a year since CWRC was to have become a carrier by means of a lease of 1,000 feet of track from AEGC. NSR has previously raised the question (unanswered) as to whether this 1,000 feet of track is within the confines of the AEGC facility (thus making the claim that it would serve any shipper on the leased line rather inconsequential). There is substantial question whether it is or ever intended to perform any railroad operations. In the ICC Proceeding, NSR raised the questions (unanswered) as to whether and when CWRC actually signed any lease that allegedly gives rise to its status as a carrier. Notwithstanding all of the inconsistencies and unanswered questions, CWRC is claiming its common carrier authority from the Board as the basis for its authority to petition for grade crossings before the ICC.

It is important for the Board, consulting federal, state and local agencies and the public to have a clear understanding of the obligation by and intent of an applicant to mitigate the environmental impacts of a project requiring regulatory approval. In this instance, SEA has taken certain representations made to it by AEGC and relied upon such in conducting its assessment of the environmental impacts of the proposed rail construction and operation project. If the Board's environmental process is to have meaning, as it must under NEPA, there must be

sufficient transparency for all interested parties to see and understand the intentions of the applicant, and a consistent set of facts presented before all agencies as to the proposal being made and evaluated. NSR believes that the process as implemented to date in this matter reveals fundamental flaws in the information relied upon by the regulators. In order to rectify these flaws and misconceptions, SEA and the Board should direct AEGC, CWRC and AFS to refile the pending petition so that the relevant regulatory agencies and interested parties can determine what the proposal is, and what environmental impacts will need to be addressed and by whom.

B. “Build” alternatives assessment

The Draft EA suffers from a second significant flaw. The Draft EA considers only one true alternative to the “no action” alternative required to be assessed in compliance with NEPA. That “build” alternative is referred to as “Route A” in the Draft EA. While the environmental impacts of “Route B” were evaluated and included in the Draft EA based on construction and operation information provided by AEGC, Route B is not in fact a plausible alternative of sufficient weight to be considered a build alternative for EA evaluation purposes.

NEPA requires an agency to consider the reasonable alternatives to the agency action proposed, and the Board’s environmental rules expressly require an applicant to describe “any reasonable alternatives to the proposed action” for purposes of the Board’s environmental review of a proposed action that requires an applicant to submit an environmental report to the Board. 49 CFR §1105.7(e)(1). Route B is not a “reasonable” option under any relevant criteria because it is premised upon an underlying set of contingencies that are not remotely likely to occur and are wholly beyond the ability of AEGC to make happen. Indeed, Route B could never be

developed without NSR voluntarily selling, leasing or otherwise allowing AEGC to use its Sorento to Coffeen track, “which would be required for Route B to be feasible.” Draft EA at 4. See also, Draft EA at 10. As AEGC is very aware, NSR has categorically stated to AEGC that it has no intention of permitting AEGC or CWRC rights over its line. Moreover, there is absolutely no legal obligation by NSR to do so. Indeed, NSR is developing additional shipper business over the line in question and has no interest in selling, leasing or otherwise altering control of operations over the line.

Thus AEGC has submitted for consideration by the STB as an alternative “build” route subject to environmental review a route – Route B – that has no meaningful possibility of being realized. As such, it cannot be held out by AEGC as a plausible build alternative relevant to the STB’s consideration of the environmental impacts of the proposed action, and SEA’s work to verify and evaluate the environmental impacts of Route B – as well as the project review conducted by the numerous other federal, state and local agencies with whom SEA has consulted – are, unfortunately, for naught. Instead, SEA is left with a Draft EA that has considered the environmental impacts of only the one build option for which AEGC has provided sufficient information in its submittals to the STB to undergo environmental evaluation in an EA. No other “reasonable” build alternatives are compared in the Draft EA.

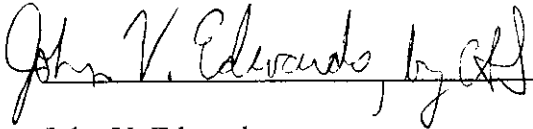
NSR is not arguing that every option considered as an alternative to the preferred route be one that would be implemented as an alternative to the preferred route – only that such options considered for the purpose of NEPA evaluation be possible. Route B is not and AEGC knows that. The purpose of NEPA is not carried out when a build alternative described by an applicant and then relied upon by the agency tasked with conducting a NEPA-compliant environmental

review of reasonable alternatives is as illusory as is Route B.

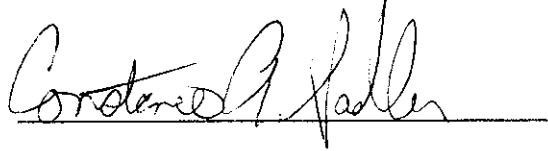
However, as indicated in the Draft EA, AEGC apparently briefly considered another rail construction option to provide it with a new rail line into its plant. Draft EA, at page 11. "Route C" was dismissed by AEGC from more rigorous environmental evaluation and was not even mentioned as a possible alternative in AEGC's February 5, 2004 Petition for Exemption filed with the Board. The Draft EA offers only AEGC's conclusory reasons for not undertaking a more intensive environmental analysis of Route C, in particular a more detailed comparison of the similarities and differences in the environmental impacts of Route A versus Route C. It may be the case that Route C is not the preferred construction alternative for a variety of reasons and that an evaluation of Route C (or other alternative routes, if relevant) as detailed as that undertaken for Route B is not necessary to complete the NEPA review of the proposed action, but as matters stand the Board and interested parties, including local communities, do not have

the benefit of more than one build option to consider, and no build alternative with which to compare Route A in any meaningful way.

Respectfully submitted,

Handwritten signature of John V. Edwards in black ink, written over a horizontal line.

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Dated: June 30, 2005

CERTIFICATE OF SERVICE

I certify that on June 30, 2005, a true copy of "Norfolk Southern Railway Company's Comments on the Draft Environmental Assessment served May 25, 2005," including all attachments, was served by overnight courier upon the following:

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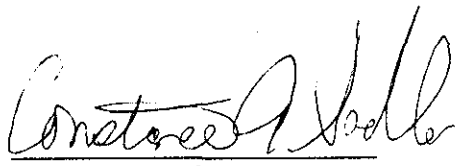
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